Norizan bt Abd Rahman v Dr Arthur Samuel

HIGH COURT (KUALA LUMPUR) — SUIT NO S-22–636 OF 2008
SITI KHADIJAH JC
31 JANUARY 2013

Tort — Negligence — Medical negligence — Whether doctor breached duty of care in failing to advise patient risks of abortion procedure — Procedure perforated uterus requiring removal of womb and ovary — Whether doctor negligent and admitted mistake to patient after surgery — Doctor failed to testify or offer rebuttal evidence — Whether appropriate to invoke adverse inference against doctor under s 114(g) of the Evidence Act 1950

Four months after the birth of her fifth child, the plaintiff, who was then 30 years old, discovered she was pregnant again and requested the defendant, an obstetrician and gynaecologist, to terminate the pregnancy and at the same time insert an intrauterine contraceptive device ('IUCD'). The plaintiff's husband accompanied her when she went to consult the defendant about the matter and he allegedly assured them the procedures they wanted done were relatively simple. However, while the procedures were being performed, the plaintiff's right uterine wall and right artery of the uterus were perforated necessitating an emergency life-saving operation by the defendant to remove her womb and right ovary. In her instant action for negligence, the plaintiff pleaded that the defendant failed to advise her beforehand of the risks involved in the procedures which, in her case, were particularly significant because she had undergone two previous abortions. The plaintiff claimed the defendant's negligence caused her much pain and suffering, emotional distress and loss of sexual intimacy with her husband. She was no longer able to bear children and the operation had caused multiple ugly scars and degloving injury. Apart from general damages for those complaints, the plaintiff claimed special damages of RM6,000 for hiring a maid for a year to help her look after her children during her post-operative recuperation period and RM1,000 for the purchase of extra nourishing food. Although the defendant filed his statement of defence to the claim and was represented by counsel at the trial, neither the defendant nor any of his witnesses attended court to testify.

Held, allowing the claim with costs and awarding the plaintiff RM220,000 in general damages (less 10% for overlapping) and RM3,000 in special damages with interest on both sums:

(1) On a balance of probabilities negligence had been clearly established that the defendant in his treatment of the plaintiff had not acted in accordance with the standard of care expected of him (see para 21).

(2) The factual evidence was clear and unrebutted that in the course of aborting the plaintiff's baby and inserting the IUCD the defendant perforated the plaintiff's uterus as a result of which he had to perform a hysterectomy and in the process remove the right ovary. The plaintiff and her husband testified on oath that the defendant and his anaesthetist admitted to them that they were at fault and had apologised for the mistakes (see para 17).

(3) The defendant was a material witness and as neither he nor any of his witnesses testified to deny the evidence of the plaintiff and her husband, the court invoked the presumption under s 114(g) of the Evidence Act 1950 that if the defendant and his two specialist witnesses had been called, their evidence would have been totally unfavourable to the defendant (see para 20).

(4) On balance of probabilities the court found the defendant had breached his duty in failing to advise the plaintiff and her husband as to the best course of action and a safer method of conducting the abortion rather than the risky procedure of a dilatation and curettage and insertion of IUCD as a single procedure. The court accepted the testimony of the plaintiff and her husband as reasonable and true that they would not have proceeded with the procedure had they been warned of the risks involved in the proposed treatment (see para 30).

[Bahasa Malaysia summary

Empat bulan selepas kelahiran anak kelimanya, plaintif, yang pada ketika itu berumur 30 tahun, mendapati bahawa dia mengandung sekali lagi dan meminta defendan, seorang obstetrik dan pakar sakit puan, untuk menggugurkan kandungan dan pada masa yang sama memasukkan satu alat kontraseptif di dalam rahim ('IUCD'). Suami plaintif menemankannya semasa dia merujuk defendan mengenai perkara tersebut dan defendan didakwa memberi jaminan kepada mereka bahawa prosedur yang mereka mahukan secara relatifnya adalah mudah. Walau bagaimanapun, semasa prosedur-prosedur tersebut dijalankan, dinding kanan uterus plaintif dan arteri kanan uterus telah berlubang dan memerlukan satu pembedahan kecemasan untuk menyelamatkan nyawa oleh defendan untuk membuang rahimnya dan ovari kanannya. Dalam tindakan ini untuk kecuaian, plaintif memplid bahawa defendan gagal untuk menasihatkan dia sebelumnya mengenai risiko-risiko yang terbabit dalam prosedur-prosedur di mana, di dalam kesnya, adalah sangat penting kerana dia telah menjalani dua pengguguran sebelumnya. Plaintif mendakwa kecuaian defendan mengakibatkan kesakitan dan penderitaan kepadanya, tekanan emosi dan kehilangan keintiman seksual dengan suaminya. Dia tidak akan dapat mengandung lagi dan pembedahan tersebut mengakibatkan beberapa parut hodoh dan 'degloving injury'. Selain daripada ganti rugi umum untuk aduan-aduan tersebut, plaintif menuntut ganti rugi khas RM6,000 untuk

menggajikan orang gaji selama setahun untuk membantunya menjaga anak-anaknya semasa tempoh pemulihan selepas pembedahannya dan RM1,000 untuk pembelian makanan berkhasiat tambahan. Walaupun defendan memfailkan penyataan pembelaannya kepada tuntutan tersebut dan diwakili oleh peguam cara semasa perbicaraan, defendan mahupun saksi-saksinya tidak menghadiri mahkamah untuk memberi keterangan.

Diputuskan, membenarkan tuntutan dengan kos dan mengawardkan plaintif RM220,000 dalam ganti rugi umum (kurang 10% kerana bertindih) dan RM3,000 dalam ganti rugi khas dengan faedah ke atas kedua-dua jumlah:

(1) Atas imbangan kebarangkalian, kecuaian jelas dibuktikan bahawa defendan ketika merawat plaintif tidak bertindak mengikut standard penjagaan yang diharapkan daripadanya (lihat perenggan 21).

(2) Keterangan fakta adalah jelas dan tidak dicabar bahawa semasa menggugurkan bayi plaintif dan memasukkan IUCD, defendan telah membuat lubang pada uterus plaintif dan akibatnya, dia perlu menjalankan histerektomi dan di dalam proses tersebut, membuang ovari kanan. Plaintif dan suaminya memberi keterangan bersumpah bahawa defendan dan pakar biusnya mengakui kepada mereka bahawa mereka yang bersalah dan meminta maaf atas kesilapan-kesilapan (lihat perenggan 17).

(3) Defendan merupakan seorang saksi penting dan memandangkan dia mahupun salah seorang daripada saksi-saksinya tidak memberi keterangan untuk menafikan keterangan plaintif dan suaminya, mahkamah menggunakan anggapan di bawah s 114(g) Akta Keterangan 1950 bahawa sekiranya defendan dan dua saksi pakar dipanggil, keterangan mereka tidak akan berpihak sepenuhnya kepada defendan (lihat perenggan 20).

(4) Atas imbangan kebarangkalian, mahkamah mendapati defendan telah melanggar tugasnya kerana gagal menasihatkan plaintif dan suaminya mengenai tindakan terbaik dan kaedah yang lebih selamat untuk menjalankan pengguguran selain daripada prosedur berisiko pembesaran dan pengkuretan dan memasukkan IUCD sebagai satu prosedur tunggal. Mahkamah menerima keterangan plaintif dan suaminya sebagai munasabah dan benar bahawa mereka tidak akan meneruskan dengan prosedur tersebut sekiranya mereka diberi amaran mengenai risiko-risiko yang terbabit dalam rawatan yang dicadangkan (lihat perenggan 30).]

Notes

For cases on medical negligence, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) paras 1306–1311.

Cases referred to

Dr Chin Yoon Hiap v Ng Eu Khoon & Ors and other appeals [1998] 1 MLJ 57, CA (refd)
F v R (1983) 33 SASR 189, FC (refd)
Foo Fio Na v Dr Soo Fook Mun & Anor [2007] 1 MLJ 593; [2007] 1 CLJ 229, FC (refd)
Munusamy v PP [1987] 1 MLJ 492, SC (refd)
Reibl v Hughes [1980] 2 SCR 880; (1980) 114 DIR (3d) 1, SC (refd)
Rogers v Whitaker (1991) 23 NSWLR 600, HC (refd)
Soton bin Bili & Anor v Khajijah binti Led & Ors [2008] 8 MLJ 521; [2008] 9 CLJ 303, HC (refd)
Tan Ah Kau v The Government of Malaysia [1995] MLJU 183; [1997] 2 AMR 1382, HC (refd)

Legislation referred to

Evidence Act 1950 s 114(g)

RK Nathan (Vinod Kamalanathan with him) (Vinod Kamalanathan & Associates) for the plaintiff.
Maidzuara Mohammed (Charlaine Adrienna Chin with her) (Raja, Darryl & Loh) for the defendant.

Siti Khadijah JC:

FACTS OF CASE

[1] Mohamed Ismail ('PW1') and his spouse Norizan bt Abdul Rahman ('PW2 the plaintiff') who was at all material times a housewife, come from parents blessed with many children and likewise the couple had wanted to have ten children between them. Four months after having their fifth child it was confirmed on 19 August 2002 that the plaintiff who was 30 years old was again pregnant. In light of the fact that the last child needed close attention, to prevent unwanted pregnancies and to be able to plan the arrival of their future babies the couple had gone to see Dr Arthur Samuel ('the defendant'), an obstetrician and gynecologist who owned a clinic known as Samuel Specialist Centre for consultation with the intention of aborting the sixth child.

[2] According to para 5(d) of the statement of claim, statement of agreed facts and by PW1 and PW2's own admission 'since the plaintiff had already had two previous abortion because the babies' arrivals were unplanned the plaintiff and her husband had gone to see the defendant for consultation and requested for a termination of the pregnancy and at the same time requested for the insertion of an intrauterine contraceptive device ('IUCD') as a single

procedure' and the defendant had agreed to perform the procedure not in his clinic but at Taipan Hospital. According to the plaintiff's case the defendant did not explain the nature and risks of the procedure but had assured them that this was a simple procedure.

[3] On 20 August 2002 after paying the consultancy fees, cost for ultrasound, cost of abortion and for inserting the IUCD, PW1 had left for work as the defendant had assured him that this was a simple procedure. On the same day plaintiff underwent D&C (dilation and curettage) and insertion of IUCD as a single procedure conducted by the defendant as scheduled. According to the plaintiff it was during this fateful operation to abort the baby that the defendant had negligently perforated her right uterine wall as well as her right artery of the uterus.

[4] Later on the same day PW1 was summoned to the hospital as the plaintiff had to undergo an emergency operation. After having obtained PW1's consent on an urgent basis an emergency operation was conducted by the defendant, hysterectomy was done and her right ovary was removed. According to the plaintiff though she was under anesthesia and semi-conscious during the process yet she could still feel sharp pain in her stomach when she received an injection from a nurse who was acting under the defendant's instructions. The plaintiff's evidence is that shortly after the abortion the defendant and one Dr Ravintheeran personally saw her and admitted their mistakes in perforating her uterus and had apologised to her.

[5] The plaintiff testifies that she suffered pain and it is undisputed that she was required to stay at the hospital for post operative recovery until 26 August 2002. She however admits having missed the review appointment with one Dr Kumar and according to the defendant counsel's submissions the plaintiff also missed other appointments with the defendant on 3 September 2002 and on 5 September 2002 with the radiologist for a repeat ultrasound. According to the plaintiff all these were because she and her husband had lost all confidence and had phobia against going back to that hospital.

[6] According to the plaintiff the hysterectomy had caused loss of her ovary leaving her without a uterus and unable to bear any more children. In the process she had endured much pain of an unnecessary laporotomy. PW1 and PW2 claimed that the whole operation has badly affected their sexual relationship all at the expense of their married life. The plaintiff who is unable to conceive again suffers mood swings, distress and depressions and she claims that the husband is showing aversion towards her as she is now sexually incapable. It is obvious from her evidence that she dreads, which PW1 does not deny, that there is no longer sexual intimacy between them the way it used to be. P1A–F are photographs produced during trial to show the unsightly effects

of the operation and the scarring to the plaintiff's lower abdomen. The plaintiff's action against the defendant is for tort of negligence in relation to the following issues:

(a) that the defendant failed to advise the plaintiff of the risk of undergoing D&C and the insertion of IUCD as a single procedure;

(b) that he failed to advise the plaintiff as to the possibility of losing or damaging an ovary or having her uterus perforated;

(c) that he had caused the perforation of the right lateral uterine wall and the right uterine artery in the course of performing the D&C and the insertion of the IUCD;

(d) that he had caused trauma to the plaintiff that it became necessary to do laparotomy on her; and

(e) that he had caused all the damages which resulted in the performance of a hysterectomy on the plaintiff.

[7] Issues to be tried:

(a) whether in the circumstances of this case the defendant had, in his treatment of the plaintiff, acted in accordance with the standard of care expected of the defendant;

(b) whether the injuries pleaded by the plaintiff can be said in law to have been caused or materially contributed by the defendant in breach of his duty of care owed to the plaintiff; and

(c) whether in the circumstances of this case, the plaintiff is entitled to the damages, interests and costs as pleaded in the statement of claim.

DUTY OF CARE AND CAUSATION

[8] The allegations of negligence as pleaded by the plaintiff are that the defendant had negligently perforated her right uterine wall and her right uterine artery.

[9] It is the plaintiff's contention that the duty of care was clearly there because by having paid the relevant charges for the D&C and the defendant having agreed and accepted the payment made, and having agreed to perform the D&C, a duty of care clearly arose between the parties.

[10] According to PW1 and PW2's evidence it was during the operation to

abort the baby that the defendant had negligently perforated her right lateral uterine wall and her right uterine artery. At para 7 of the bundle of pleadings the plaintiff has pleaded that the said perforation was due solely to the negligence of the defendant in the assessment, management and performance of the D&C on the person of the plaintiff. From the evidence the facts are clear that plaintiff had suffered perforation and all the other injuries mentioned as a result of which an emergency laparotomy and a hysterectomy had to be performed to save her life. The defendant being a material witness and his other witnesses on the other hand have chosen not to attend court to explain their actions.

[11] Apart from that there is sworn evidence from PW1 and PW2 that the defendant had admitted to both of them that he was negligent. According to the couple even the anesthetist one Dr Ravintheeran confirmed that there was 'kesilapan'. The plaintiff's contention is that the defendant's apology to the plaintiff and her husband amounts to an admission of negligence. The defendant and Dr Ravintheeran including one Professor Kulendran who has also given notice to attend as a witness have all chosen not to come to court to answer or deny the claim. On this point the plaintiff is asking this court to invoke s 114(g) of the Evidence Act 1950 in that their evidence if available would be totally unfavorable to the defendant. Apart from that though the defendant has pleaded at paras 9.1–9.2 of his defence that 'perforation of a uterus in the course of a dilatation and curettage is a known risk', and 'that there was an increased risk of perforation in the case of the plaintiff due to her previous pregnancies and termination of pregnancy' the defendant did not attend court to support his averments.

[12] There is no dispute in this case that the defendant owed a duty of care to the plaintiff. The defendant however submits that as a plea of negligence per se does not discharge the legal burden on the plaintiff to prove breach of duty of care the burden remains on the plaintiff in medical diagnosis and treatment to first prove that the actions of the defendant were what a reasonable doctor would not have done or that the omissions of the defendant were what a reasonable doctor would have done, quoting what was said in *Dr Chin Yoon Hiap v Ng Eu Khoon* [1998] 1 MLJ 57 at p 76, 'whether he has been proved to be guilty of such failure as no doctor of ordinary skill acting with ordinary care would be guilty of'.

[13] It is the defendant's counsel submission that as in medical negligence the law requires evidence from a medical practitioner of the area of medical practice in question it is therefore necessary in this case for the evidence to come from a medical practitioner with a practice in obstetrics and gynecology. Here it is also said that the plaintiff has failed to adduce medical evidence on

what is the accepted standard of care; that the defendant has fallen below the accepted standard of care; and that the defendant has not done what is expected of a reasonable doctor.

[14] In respond to the above the plaintiff submits that the defendant's reliance on *Dr Chin Yoon Hiap* is misleading and outdated as this case relied on the Bolam test which decided at held 3 as follows:

> To succeed in an action based on negligence, whether against a doctor or against anyone else, it is necessary to establish a breach of that duty to take care which the law requires, and the degree of want of care which constitutes negligence must vary with the circumstances. Where the conduct of a doctor is concerned, the circumstances are not so precise and clear cut as in the normal case. The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill acting with ordinary care would be guilty of. A doctor cannot be held negligent if he follows what is the general and approved practice in the situation with which he is faced. The standard of care expected of a medical practitioner is that he is not required to exercise the highest or very high standard but only a fair and reasonable standard of care and skill in the treatment of his patients. On these considerations, the claim against the second and third defendants must fail (see pp 76 E–I and 77 A–D); *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118, *Hunter v Hanley* [1955] SC 200, *Caswell v Powell Duffryn Associated Collieries* [1940] AC 152 and *Elizabeth Choo v Government of Malaysia & Anor* [1970] 2 MLJ 171 followed.

[15] The defendant has failed to disclose that the Bolam test has been declared outdated by the Federal Court in *Foo Fio Na v Dr Soo Fook Mun & Anor* [2007] 1 MLJ 593; [2007] 1 CLJ 229 where at held 4 (CLJ) the Federal Court decided as follows:

> Bearing in mind the authorities, there is a need for members of the medical profession to stand up to the wrong doings, if any, as in the case of professionals in other professions. In so doing, people involved in the medical negligence cases would be able to obtain better professional advice and the courts would be appraised with evidence that would assist them in deliberations. On this basis, we are of the view that *Rogers v Whitaker* test would be a more appropriate and a viable test of this millennium than the Bolam test.

[16] In *Rogers v Whitaker* (1991) 23 NSWLR 600 the Australian High Court had rejected the Bolam test and held that a finding of medical negligence may be made eventhough the conduct of the defendant was in accordance with a practice accepted at the time as proper by a responsible body of medical opinion; and further in *F v R* (1983) 33 SASR 189 that 'but professions may adopt unreasonable practices. Practices may develop as to disclosure, not because they serve the interest of clients, but because they protect the interests

or convenience of members of the profession. The court has an obligation to scrutinise professional practices to ensure that they accord with the standard of reasonableness imposed by the law'.

[17] In the present case I accept the plaintiff's evidence in court in support of what have been pleaded, and the factual evidence remains clear and unrebutted that in the course of aborting the plaintiff's baby and inserting the IUCD the defendant had perforated the plaintiff's uterus as a result of which the defendant had to perform a hysterectomy and in the process had to remove the plaintiff's right ovary. PW1 and PW2 have testified on oath that the defendant and his anesthetist admitted to them that they were at fault and had apologised for the mistakes. I am of the opinion that at this juncture the plaintiff's plea of negligence has been established.

[18] Pursuant to s 114(g) of the Evidence Act of 1950 the court may presume adverse inference against a party that withholds evidence which the party could but did not produce, in this case by the defendant, who was himself a material witness.

> 114. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> (g) that evidence which could be and is not produced would if produced be unfavorable to the person who withholds it.

[19] In the Supreme Court case of *Munusamy v Public Prosecutor* [1987] 1 MLJ 492 Mohamed Azmi SCJ touched on the scope of s 114(g) of the Evidence Act 1950 where His Lordship held at p 494:

> It is essential to appreciate the scope of s 114(g) lest it be carried too far outside its limit. Adverse inference under that illustration can only be drawn if there is withholding or suppression of evidence and not merely on account of failure to obtain evidence. It may be drawn from withholding not just any document, but material document by a party in his possession, or for non-production of not just any witness but an important and material witness to the case.

[20] As the defendant being a material witness and none of his witnesses took the witness stand to deny PW1 and PW2's evidence, this court is invoking the presumption under s 114(g) of the Evidence Act 1950 that if the defendant and the two other specialists namely Professor Kulendran and Dr Ravintheeran have been called their evidence would be totally unfavorable to the defendant.

[21] Flowing from the above and based on all the evidence available it is clear

to this court that there is a causative link between the plaintiff's injuries and the defendant who performed the procedure and the operation on the plaintiff and the injuries as pleaded have been caused or materially contributed to by the defendant in breach of his duty of care owed to the plaintiff. At this juncture and on a balance of probabilities I find that negligence has been clearly established that the defendant in his treatment of the plaintiff did not act in accordance with the standard of care expected of him.

DUTY TO ADVICE AND CAUSATION

[22] The allegations of negligence as pleaded by the plaintiff are that the defendant did not advise the plaintiff on the risks involved in the D&C procedure; the possibility of perforation of the uterus; and the risks of undergoing a D&C and insertion of an IUCD as a single procedure.

[23] Notwithstanding the aforesaid averments the defendant's counsel reminds the court of the following facts based on the plaintiff and her husband's testimony:

> The plaintiff had received education up to O level in Singapore and she had worked as an air stewardess with Singapore Airlines for a number of years. The plaintiff had undergone two previous terminations; both previous terminations were done by way of D & C; the plaintiff went to the hospital having decided to terminate her sixth pregnancy; the plaintiff had read the Consent Form before the defendant carried out the D & C on her; and she had signed the Consent Form for the D & C.

[24] On the other hand plaintiff confirms that on two previous occasions she had undergone the D&C and had the IUCD inserted the IUCD was not inserted on the same day as the D&C procedure. The plaintiff and PW2 assert that the defendant did not explain the nature and risks of the procedure but had assured them that this was a simple procedure. She also confirms that when she signed the consent form for the D&C she was never explained that there was a possibility of her uterus being perforated and she did not know the type of the D&C that was done on her. According to the plaintiff's husband he was not explained as to the meaning of laporotomy and hysterectomy. He was told to sign the consent form as it was urgent and that was what he did on an urgent basis.

[25] The plaintiff denies that the defendant or the anesthetist Dr Ravintheeran explained to her the nature and risk of the procedure otherwise she would never have taken the risk of undergoing the D&C and insertion of IUCD as a single procedure. Both the plaintiff and her husband testified that if only the defendant had explained to them the possibility of a perforated uterus and the risks involved in the D&C process they would have opted either

not to undergo the said procedure and accept the child or they could have gone somewhere else for the alternative vacuum suction procedure if this procedure was not provided by the defendant. It is the plaintiff's contention that as a result of the defendant's negligence, a hysterectomy was done on her and her uterus was removed.

[26] In the case of *Foo Fio Na v Dr Soo Fook Mun & Anor* [2007] 1 MLJ 593 the Federal Court held that a doctor is duty bound by law to inform his patient who is capable of understanding and appreciating such information of the risks in any proposed treatment so as to enable the patient to make an election of whether to proceed with the proposed treatment with knowledge of the risks involved or decline to be subjected to such treatment.

[27] In *F v R* (1983) 33 SASR 189 at para 48 F–H of this case the scope of the duty to disclose was outlined in the following manner:

> Determination of the scope of the doctor's duty to disclose involves consideration of two values which are sometimes in conflict, namely the duty of the doctor to act in what he conceives to be the best interests of his patient and the right of the patient to control his own life and to have the information necessary do so.
>
> What is in question is the scope of the doctor's duty of care. He is required to act reasonably, not only in his actual treatment of the patient, but also in relation to the disclosure of information. In *Chatterton v Gerson* Bristow J held that it is the duty of a doctor to explain what he intends to do, and its implications, in the way a careful and responsible doctor in similar circumstances would have done. It is my opinion that that is a correct statement of the law, and that the duty extends, not only to the disclosure of real risks of misfortune inherent in the treatment, but also any real risk that the treatment, especially if it involves major surgery may prove ineffective.
>
> What a careful and responsible doctor would disclose depends upon the circumstances. The relevant circumstances include the nature of the matter to be disclosed, the nature of the treatment, the desire of the patient for information, the temperament and health of the patient, and the general surrounding circumstances.

[28] In this case the defendant has pleaded at para 9 of his statement of defense at para 9.2 'that there was an increased risk of perforation in the case of the plaintiff due to her previous pregnancies and termination of pregnancy'. In *F v R* King CJ considered that the amount of information or advice which a careful and responsible doctor would disclose depended upon a complex of factors: the nature of the matter to be disclosed; the nature of the treatment; the desire of the patient for information; the temperament and health of the patient; and the general surrounding circumstances. His Honour agreed with the following passage from the judgment of the Supreme Court of Canada in *Reibl v Hughes* [1980] 2 SCR 880 at pp 894–895; (1980) 114 DIR (3d) 1 at p 13:

To allow expert medical evidence to determine what risks are material and, hence, should be disclosed and, correctively, what risks are not material is to hand over to the medical profession the entire question of the scope of the duty of disclosure, including the question whether there has been a breach of that duty. Expert medical evidence is, of course, relevant to finding as to the risks that reside in or are a result of recommended surgery or other treatment. It will also have a bearing on their materiality but this is not a question that is to be concluded on the basis of the expert medical evidence alone. The issue under consideration is a different issue from that involved where the question is whether the doctor carried out his professional activities by applicable professional standards. What is under consideration here is the patient's right to know what risks are involved in undergoing or foregoing certain surgery or other treatment.

[29] In *Tan Ah Kau v The Government of Malaysia* [1995] MLJU 183; [1997] 2 AMR 1382 in applying the *Rogers v Whitaker* test, Low Hop Bing J (as he then was) concluded as follows at p 1402, 'In the instant case, where the risk of paralysis was very real, more so than the tumor was intra medullar, it was absolutely essential for the attending surgeon such as DW1 or any doctor assisting him to warn the patient of the foreseeable risk of even a finding of intra medullar tumor'.

[30] During trial I have had the opportunity of observing and assessing PW1 and PW2's demeanor, their credibility and reliability of their evidence. After thorough consideration of their evidence I find that I believe their evidence as true. From their evidence it is clear that they have gone to see the defendant not only for treatment but had also paid him the consultation fees which naturally mean 'for his advice'. I accept their testimony as reasonable and true that they would not have proceeded with the procedure had they been warned of the risks in the proposed treatment and the possibility of the plaintiff's uterus being perforated during the D&C process and the insertion of IUCD as a single procedure. The defendant on the other hand has chosen not to offer any evidence and has stayed away from the court during trial. As a result he has failed to put to the plaintiff that she ought to have known the risks involved. On a balance of probabilities I find that the defendant had failed to advise the plaintiff and her husband as to the best course of actions and a safer method of conducting abortions rather than the risky procedure of D&C and insertion of IUCD as a single procedure.

[31] In the circumstances of the case I find that the defendant was in breach of his duty to advice and as a result of the breach the plaintiff has suffered damages as claimed.

ASSESSMENT OF DAMAGES

Special damages

Cost of employing a maid for a year

[32] The plaintiff is claiming RM6,000 as the cost for employing a maid at RM500 a month for a year to help her look after her children and help them through during the time when the plaintiff was ill as a result of what happened to her in this case. It cannot be disputed that it is unlikely that anyone would have and keep receipts for the monthly salary payments they make to their maids. For a practice where ordinarily nobody would have and keep receipts for such payments I am of the opinion it deserves special consideration and should be an exception to the requirement that receipts be made available to the court for such claims.

[33] On whether it is reasonable that this claim should be allowed I would think it very much depends on the facts and circumstances of each case to be considered and weighed accordingly. In this case it is reasonable that the couple had to employ a helping hand to help the plaintiff, who was suffering from serious depression as a result of what happened, to look after and cope with her five children particularly the younger one who was only a few months old at that time. I am also of the opinion that six months is a reasonable span of time in the circumstances before the plaintiff could take charge of herself again. I consider a claim of RM500 a month for six months as reasonable and an award of RM3,000 should be allowed under this claim.

Cost of extra nourishing food

[34] As to the claim for RM1,000 as the sum being cost of the extra nourishing food for the plaintiff to help her recuperate it is a known fact and practice that receipts would be given for products purchased. It is a common practice acceptable by all regardless of sex, race or religion, young and old that at times of illness one would try to consume nourishing food. I do not think one needs medical evidence to prove that, but the law stands clear that receipts must be produced as proof of purchase of the nourishing food. In this case it is too bad that the couple had not taken the trouble to keep the receipts to be produced in court as proof of purchase of the nourishing food. It is trite law that claim for special damages must be proven. I therefore cannot allow plaintiffs claim under this heading.

General damages

[35] The plaintiff suffered laporotomy, hysterectomy, loss of the right ovary

and inability to conceive, multiple scars and degloving injury resulting in unsightly tissue and muscle constriction; emotional distress and loss of sexual intimacy.

Gynecological injuries

[36] For laporotomy the plaintiff is asking for an award of RM20,000 as reasonable citing *Soton Bili & Anor v Khajijah Led & Ors* [2008] 8 MLJ 521; [2008] 9 CLJ 303 which was decided four years ago where RM15,000 was awarded for laporotomy together with a fracture of the pubic rami. According to the submissions by counsel for the defendant *Soton Bili*'s case is not suitable as in that case the injuries suffered were leg related and not in any way related to gynecological injuries. In this case for all the injuries suffered that fall under the category of gynecological injuries I am of the considered view a global award of RM120,000 would be fair and reasonable ie for laporotomy, hysterectomy, the loss of the right ovary, the plaintiff's inability to conceive and for the pain and suffering that she had gone through.

Multiple scars and degloving injury resulting in unsightly tissue and muscle constriction

[37] For the unsightly multiple scars and muscle constriction which the beautiful young the plaintiff suffered at the hands of the defendant as shown in the photographs I am awarding a sum of RM20,000 which I consider fair and reasonable in the circumstances of case.

Emotional distress and loss of sexual intimacy

[38] As to the couple's evidence (which was not subjected to any form of cross-examination) on emotional distress, serious depression, pain and anguish and loss of sexual intimacy resulting in an obviously painful relationship between the plaintiff and her husband, the plaintiff is claiming RM100,000. For all that this young lady is suffering under this heading which have affected her life and her future, and that of her family I am of the opinion that RM80,000 is the reasonable amount to be awarded to her.

[39] Basing on the principle of overlapping I'm making an order that 10% be deducted from the total awards.

[40] As the plaintiff has on a balance of probabilities successfully proven her case I'm allowing her claim with cost of RM15,000. Interest on special damages at 4%pa from date of incident to the date of judgment and 8%pa from date of

judgment to date of realisation of judgment and 8%pa for general damages from the date of service of the writ until date of realisation of the judgment.

Claim allowed with costs and plaintiff awarded RM220,000 in general damages (less 10% for overlapping) and RM3,000 in special damages with interest on both sums.

Reported by Ashok Kumar